United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7110

To be argued by
LAWRENCE WALDMAN

In The

United States Court of Appeals

For The Second Circuit

ALICE MEYERS, RAYMOND MEYERS, KIM MEYERS, an infant by RAYMOND MEYERS, her father and natural guardian, JAMIE MEYERS, an infant by RAYMOND MEYERS, her father and natural guardian; JONI EPSTEIN, an infant by SAMUEL EPSTEIN, her father and natural guardian, and ROBIN SIEGEL, an infant by BERNARD SIEGEL, her father and natural guardian,

Plaintiffs-Appellants,

vs.

NATIONAL AIRLINES, INC.,

Defendant-Appellee.

BRIEF FOR PLAINTIFF-APPELLANT, ALICE MEYERS

LAWRENCE WALDMAN
Attorney for Plaintiff-Appellant, Alice Meyers
111 West 57th Street
New York, New York 10019
CO 5-5385

(8237) LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing

South River, N. J. (201) 257-6850 | New York, N. Y. (212) 565-6377 | Philadelphia, Pa. (215) 563-5587 | Washington, D. C. (202) 783-7288

INDEX

CITATIONS

STATUTES & RULES

REFERENCE BOOKS

STATUTE AND RULE IN ISSUE

FEDERAL RULES OF CIVIL PROCEDURE 56 (e)

SUMMARY JUDGMENT

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and support as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial, if he does not so respond, summary judgment, if appropriate, shall be entered against him.

CIVIL PRACTICE LAWS AND RULES
Rule 3212 Motion for Summary Judgment.

(b) Supporting proof; grounds, relief to either party. A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers

and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact other than an issue as to the amount or the extent of the damages. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
75-7110

---X

ALICE MEYERS, RAYMOND MEYERS, KIM MEYERS, an infant by RAYMOND MEYERS, her father and natural guardian, JAMIE MEYERS, an infant, by RAYMOND MEYERS, her father and natural guardian, JONI EPSTEIN, an infant by SAMUEL EPSTEIN, her father and natural guardian, and ROBIN SIEGEL, an infant by BERNARD SIEGEL, her father and natural guardian,

Plaintiffs,

-against-

NATIONAL AIRLINES, INC.,

Defendant.
---X

ON APPEAL FROM UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT
ALICE MEYERS

PRELIMINARY STATEMENT

This is an appeal by Alice Meyers from an order of the United States District Court for the Southern District of New York, Owen, J., entered on February 4, 1975, in so far as it dismisses the first four

causes of action of the amended complaint of Alice Meyers against National Airlines, Inc., on a motion brought for partial summary judgment. The decision of the Court below was not reported.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
75-7110

ALICE MEYERS, RAYMOND MEYERS, KIM MEYERS, an infant by RAYMOND MEYERS, her father and natural guardian, JAMIE MEYERS, an infant, by RAYMOND MEYERS, her father and natural guardian, JONI EPSTEIN, an infant by SAMUEL EPSTEIN, her father and natural guardian, and ROBIN SIEGEL, an infant by BERNARD SIEGEL, her father and natural guardian,

Plaintiffs,

-against-

NATIONAL AIRLINES, INC.,

Defendant.

ISSUES PRESENTED FOR REVIEW

1. A motion in the Court below was brought pursuant to Rule 56 (e) F.R.C.P. which is in the nature of a motion for summary judgment, similar to Rule 3212b, C.P.L.R.. The sole supporting affidavit was that of an attorney for the appellee, National Airlines, who had no personal knowledge of the facts. The first issue, thus presented, is whether such motion would lie, absent facts, in support thereof, attested to by a witness having knowledge of the facts. With respect thereto, the further issue presented is whether such motion for summary judgment could be granted in the absence of clear and convincing documentary proof and evidence sufficient to

prove that no triable issue of fact exists.

2. Whether the allegations contained in the first and second causes of action of the amended complaint set forth facts sufficient to state a cause of action in negligence.

3. Whether the allegations contained in the third and fourth causes of action of the amended complaint set forth facts sufficient to state a cause of action for breach of the implied warranty of safe passage.

4. Whether appellant Alice Meyers should not be offered an opportunity to replead those causes of action stricken by the Court below.

STATEMENT OF THE CASE

The instant action arises out of a series of events which occurred on January 2, 1971, in the terminal facilities owned, operated, managed and controlled by the appellee, National Airlines, at Miami International Airport and upon an aircraft owned, operated, managed and controlled by National Airlines on said date.

That, a prior order of Hon. Richard Owen, Judge of the United States District Court, Southern District of New York, made and entered April 12, 1974, dismissed causes of action on behalf of appellant, Alice Meyers, against appellee, National Airlines, for assault and false arrest upon the grounds that said causes of action were barred by the Statute of Limitations. No appeal was taken from said order.

That, on February 4, 1975, District Court Judge Richard Owen entered an order dismissing four causes of action in the amended complaint which had been previously pleaded in the original complaint as causes of action in negligence and breach of warranty upon the grounds that said actions were, in fact, actions for wilfull torts and were thus barred by the Statute of Limitations. It is from this order that the instant appeal is taken. (3a, 4a)

STATEMENT OF FACTS

That, on or about November 9, 1970, Alice Meyers purchased from National Airlines, for a good and valuable consideration, a round-trip airline passage ticket from New York City to Miami, Florida. This ticket contained a confirmed reservation for a flight on National Airlines, scheduled to depart Miami International Airport on January 2, 1971, at 4:30 p.m. (51a, 52a, 53a)

That, although this said reservation was good up until one-half hour prior to departure time, Alice Meyers arrived at National Airlines' ticket counter approximately two hours prior to departure time and was assigned a seat for said flight. National, at that time, was concededly a common carrier. (54a)

In her amended complaint, Alice Meyers alleges that National Airlines was careless, reckless and negligent in that National had:

(a) over-booked the said flight; (55a, 56a)

(b) permitted a person, with no seat assignment to be seated in the seat which National had previously assigned to Alice Meyers; (55a)

(c) permitted stand-bys to enter said aircraft and to be seated in preference to Alice Meyers; (55a)

(d) ignored the confirmed reservation of Alice Meyers for said flight, even though said reservation had been "checked" at the ticket counter of National approximately two hours prior to departure time; (54a, 55a)

(e) when Alice Meyers notified National that there was no seat on the flight for her, National failed and refused to investigate the situation; (56a)

(f) when Alice Meyers called to the attention of National that a person, with no seat assignment, had been seated in the seat assigned to her by National, National refused to investigate; (56a)

(g) when Alice Meyers called to the attention of National Airlines that a person with no seat assignment was seated in the seat assigned to her: (55a)

(1) National Airlines failed and refused to remove said passenger without a seat assignment from the seat which had been assigned to Alice Meyers; (55a)

(2) National Airlines failed and refused, in any manner, to honor either the confirmed reservation of Alice Meyers or the seat assignment issued to her; (54a - 56a)

(3) National Airlines failed and refused Alice Meyers repeated requests to investigate the situation; (55a - 56a)

(4) National Airlines failed and refused Alice Meyers repeated requests to examine her seat assignment receipt; (55a - 56a)

(5) National Airlines failed and refused Alice Meyers repeated requests to seek or produce a seat assignment receipt for that passenger who had occupied the seat which National had assigned to Alice Meyers; (55a - 56a)

(6) National Airlines failed and refused Alice Meyers repeated requests to honor either the confirmed reservation which Alice Meyers had received on November 9, 1970, nor the seat assignment

which National had issued to Alice Meyers on January 2, 1971; (55a - 56a)

(h) that Alice Meyers continuously and repeatedly exhibited her "boarding pass" and her seat assignment to the agents, servants and employees of National Airlines; (55a - 56a)

(i) that National Airlines failed and refused to follow its own rules, regulations and procedures and, in effect, with respect to honoring confirmed reservations; (50a, 51a, 57a)

(j) that National Airlines failed and refused to follow its own rules, regulations and procedures and, in effect, with respect to honoring specific seat assignments. (50a, 51a, 57a)

That, the amended complaint and more particularly the first cause of action, further alleges that National, after actual notice and knowledge of the actual facts, hereinabove set forth, was further careless, reckless and negligent in that National did then:

(a) demand that Alice Meyers leave the aircraft; (56a)

(b) advised Alice Meyers that she would not be permitted to fly back to New York upon said aircraft; (56a)

(c) called the police to effectuate removal of Alice Meyers from said aircraft; (57a)

(d) did cause Alice Meyers to be removed from said aircraft. (57a)

That, all of these acts are alleged in the amended complaint to be carelessness, recklessness and negligence on the part of National Airlines and the allegation of negligence with respect thereto is fully set forth in paragraph "SEVENTY-EIGHTH" of the amended complaint which alleges: (57a)

"That, the aforesaid acts of defendant were occasioned wholly and solely through the carelessness, recklessness and negligence of the defendant, with no fault or lack of care on the part of the plaintiff, Alice Meyers, contributing thereto, in that said defendant operated, managed, directed and controlled their aforesaid boarding operations in a careless, reckless and negligent manner; in that said defendant, its agents, servants, and employees, failed and refused to obey defendant's own instructions to its agents, servants and employees for boarding procedures; and in that said defendant operated, managed, directed and controlled the use of its aircraft by its passengers in so careless, reckless and negligent a manner as to cause the injuries and damages complained of herein." (57a)

That, appellant, Alice Meyers, seeks in her first cause of action of the amended complaint compensatory damages from appellee National Airlines for the negligent, careless and reckless acts of said airline, as set forth, above. (59a)

That, upon the same set of facts, Alice Meyers seeks punitive damages for gross and wanton negligence in her second cause of action against National Airlines. (60a)

That, appellant Alice Meyers, in the third cause of action of the amended complaint seeks compensatory damages against the appellee National Airlines for breach of the implied warranty of safe passage, based upon the facts, as hereinabove outlined.

"NINETY-THIRD: That, at the time that said defendant, its agents, servants and employees, offered its tickets for sale to the general public, for passage upon its aircraft, it impliedly warranted to the general public that it would render, in exchange for the purchase of a ticket, safe passage upon its aircraft.

NINETY-FOURTH: That, in reliance upon this implied warranty of safe passage upon its aircraft, plaintiff purchased passage for the use upon an aircraft owned, operated, managed and controlled by defendant.

NINETY-FIFTH: That, the defendant, its agents, servants, and employees, breached the aforesaid implied warranty of safe passage, as aforesaid." (60a - 61a)

That, the fourth cause of action is an action for punitive damages for breach of the implied warranty of safe passage. (61a)

POINT I

SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The record, herein, does not support the order of the Court, below, granting summary judgment. The Court, below, erred in granting summary judgment in two crucial areas:

(a) the moving papers (40a - 43a) lacked the affidavit of a person having knowledge of the facts (9a - 19a). Both Rule 56e of the F.R.C.P. and Rule 3212b C.P.L.R. require that a motion for summary judgment be supported by:

> "the affidavit of a person having knowledge of the facts which shall recite all the material facts and it must show that the cause of action has no merit;
>
> the motion may be granted only if the Court would, as a matter of law, direct judgment in favor of the moving party;
>
> the motion must be denied if any party shall show facts sufficient to require a trial of any issue of fact . . ."

In applying this proscription to the instant motion, we find that the moving papers lack the affidavit of any person having knowledge of what transpired at the terminal of the defendant or on its aircraft on January 2, 1971. Surely, the affidavit of the attorney for National Airlines cannot be considered to have any probative value in this regard. The law is clear that the affidavit of an attorney who has no personal knowledge of the facts has no probative value and must be disregarded. (Israelson v. Rubin, 20 A.D. 2d 668, 247 N.Y.S. 2d 85, affirmed 14 N.Y. 2d 887, 252 N.Y.S. 2d 90; Yancy v. Gambee, 5 Misc. 2d 743, 283 N.Y.S. 2d 311)

(b) Summary judgment lies only where there is no triable issue of fact. The conclusory allegations and hearsay statements of the attorney for National Airlines as to the import of the deposition of appellant, Alice Meyers, do not constitute evidence (18a, 19a). (Central School District v. Cohen, 60 Misc. 2d 337, 302 N.Y.S. 2d 398) The party seeking summary judgment has the burden of producing evidence as upon a trial (Oxford Paper Co. v. S. M. Liquidation Co., 45 Misc. 2d 612, 257 N.Y.S. 2d 395) and such evidentiary facts must establish his defense to entitle him to judgment as a matter of law (First Trust & Deposit Co. v. W.W. Conde Hardware Co., 47 Misc. 2d 338, 262 N.Y.S. 2d 565). Where any triable issue of fact exists, summary judgment may not be granted. (Hartford v. Wesolowski, 350 N.Y.S. 2d 895, 33 N.Y. 2d 169, 305 N.E. 2d 907; Philips v. Joseph Kantor & Co., 338 N.Y.S. 2d 882, 31 N.Y. 2d 307, 291 N.E. 2d 129; Glick & Dolleck, Inc. v. Tripac Export Corp., 293 N.Y.S. 2d 93, 22 N.Y. 2d 439, 239 N.E. 2d 725; Millerton Agway Coop Inc. v. Briarcliff Farms, Inc., 268 N.Y.S. 2d 18, 19 N.Y. 2d 57, 215 N.E. 2d 341)

> "[I]f 'in any aspect upon the facts stated [the plaintiff is entitled to recovery' (Abrams v. Allen, 297 N.Y. 52, 54, 74 N.E. 2d 305, 173 A.L. R. 671), a motion for insufficiency must be denied (citing cases)"

Kaminsky v. Kahn, 13 A.D. 2d 143, 146, 213 N.Y.S. 2d 786, 789, as cited with approval in Kaufman v. Sweigard, 27 A.D. 2d 717, 277 N.Y.S. 2d 498, 499.

The motion in the Court, below, while called a motion for partial summary judgment pursuant to Rule 56(b), is similar to a motion, for judgment on the pleadings or a motion to dismiss the complaint for failure to state a cause of action pursuant to Rule 12 and Rule 3211

C.P.L.R. Under such circumstances, since it is the amended complaint to which the demurrer is filed, all of the allegations of the complaint must be taken as true.

> On the motion at bar, only the question of a claimant's pleading is presented for determination. It is not my present province to consider the merits of claimant's claims or the credibility of any witness. So, too, now I cannot weigh any possible defense or assay anticipated evidence unless the pleading alleges an utter impossibility. On a motion to dismiss a pleading, one is confined to the boundaries of the pleaded matters which are accepted as though proven. Our Appellate Division, Third Department, in First National Bank of Morrisville v. International Radiant Corporation, 5 A.D. 2d 1043, 173 N.Y.S. 2d 383 (April, 1958), succinctly and effectively wrote, at page 1044, 173 N.Y.S. 2d at page 384:
>
> > "The motion admits all facts alleged in the complaint and inferences that may be fairly drawn. Greef v. Equitable Life Assurance Society, 160 N.Y. 19, 54 N.E. 712, 46 L.R.A. 288; see also Glassman v. Glassman, 309 N.Y. 436, 439, 131 N.E. 2d 721, 723. In Oleet v. Pennsylvania Exchange Bank, 285 App. Div. 411, 413, 137 N.Y.S. 2d 779, 782, the Court said: 'The transaction must be considered in its totality.' The merits of the action are not before the Court on this motion. In Schwartz v. Hefferman, 304 N.Y. 474, at page 482, 109 N.E. 2d 68, at page 71, * * * the court said: 'By moving to strike the pleading for insufficiency, defendants have authorized us, temporarily, to accept its statements as true.'"
>
> Williams v. State, 46 Misc. 2d 824, 826, 260 N.Y.S. 2d 953, reversed on other grounds, 25 A.D. 2d 906, 269 N.Y.S. 2d 786, affirmed, 18 N.Y. 2d 481, 276 N.Y.S. 2d 885.
>
> To the same effect: Mann v. Mann, 255 N.Y.S. 2d 686; Williams v. Williams, 23 N.Y. 2d 592, 298 N.Y.S. 2d 473.

> It is elementary that upon a motion to strike a pleading as insufficient in law the court must assume the truth of every allegation in such pleading and every inference reasonably to be drawn therefrom. (Garvin v. Garvin, 306 N.Y. 118, 120, 116 N.E. 2d 73, 75) Hence, the court must assume for the purposes of this motion alleged facts which may be difficult to believe and difficult for the defendant to establish upon the trial. (See Caristo Constr. Corp. v. Diners Fin. Corp., supra, 45 Misc. 2d 549, 554, 257 N.Y.S. 2d 423, 429.)

Travelers Indemnity Co. v. Central Trust Co., 47 Misc. 2d 849, 263 N.Y.S. 2d 261, 265.

Under all of these circumstances, it is respectfully submitted that the motion for partial summary judgment in the Court, below, should have been denied.

POINT II

THE GRAVAMEN OF THE FIRST CAUSE OF ACTION OF THE AMENDED COMPLAINT IS NEGLIGENCE.

The first cause of action of the amended complaint sets forth each and every act of negligence alleged to have been committed by National Airlines. Said acts are not cumulative but are separate and distinct acts of negligence, stated, ad seriatum.

> "Negligence is lack of ordinary care. It is a failure to exercise that degree of care which a reasonably prudent person would have exercised under the same circumstances. It may arise from doing an act which a reasonably prudent person would not have done under the same circumstances, or, on the other hand, from failing to do an act which a reasonably prudent person would have done under the same circumstances."

Pattern Jury Instructions, 2:10.

A common carrier is required to exercise reasonable care for the safety of its passengers. Reasonable care means that degree of care which a reasonably prudent carrier of passengers would exercise under the same circumstances, in keeping with the dangers and risks known to the carrier or which it should reasonably have anticipated.

McLean v. Triboro Coach Corp., 302 N.Y. 49, 96 N.E. 2d 83; Meisle v. N.Y.C. & H.R.R. Co., 210 N.Y. 317, 114 N.E. 347; Stierle v. Union Railway Co., 156 N.Y. 70, 74, 50 N.E. 419, on reargument 156 N.Y. 684, 50 N.E. 834; Piper v. New York City and H.R.R. Co., 156 N.Y. 224, 50 N.E. 851; Amoruso v. N.Y.C. Transit Auth., 12 A.D. 2d 11, 207 N.Y.S. 2d 855; Thomas v. Central Greyhound Lines, 6 A.D. 2d 649, 180 N.Y.S. 2d 461; Barbato v. Vollmer, 273 App. Div. 169, 76 N.Y.S. 2d 528; Taddeo v.

Tilton, 248 App. Div. 290, 289 N.Y.S. 427.

Appellant, Alice Meyers, was admittedly and concededly a passenger of appellee, National Airlines, a common carrier.

National Airlines is answerable for the negligence of its agents, servants and employees in executing a proprietary function and was required to execute a requisite amount of care to the appellant, Alice Meyers, herein (Murrain v. Wilson Wright, Inc., 70 App. Div. 372, 59 N.Y. Supp. 750).

A common carrier is negligent when it fails to exercise that degree of care necessary to protect a passenger thereon from injury, even if that injury is in the form of an assault. Siegelbaum v. Dowling, 254 App. Div. 336, 5 N.Y.S. 2d 57.

A common carrier has a non-delegable duty to provide safe passage and to protect its passengers. (Rocher v. N.Y.C.T.A., 172 N.Y.S. 2d 837, application for leave to appeal denied, 172 N.Y.S. 2d 536; Kearns v. Brooklyn Queens Transit, 254 App. Div. 779, 4 N.Y.S. 2d 764)

An action in negligence lies when a defendant, common carrier, does not exercise reasonable vigilance and diligence to protect its passengers. Crawford v. Brooklyn & Queens Transit, 254 App. Div. 582, 3 N.Y.S. 2d 105.

> "It is settled that a common carrier has a legal duty, after due notice, to protect its passengers from the assaults of fellow passengers. Green Bus Lines v. Ocean Accident & Guaranty Corp., 287 N.Y. 309, 312, 39 N.E. 2d 251, 253, 162 A.L.R. 241. The liability of the carrier is predicated on its failure properly to exercise the police power with which it is vested for the protection of well-disposed and peaceable passengers. Putnam v. Broadway & Seventh Ave. R. Co., 55 N.Y.108, 113."

(Goodwin v. The City of New York, 206 Misc. 740, 134 N.Y.S. 2d 373)

The amended complaint alleges an overbooking of a flight. Concededly, no aircraft may carry more passengers than it has seats and the sale of seats in excess of the number available constitutes overcrowding. Overcrowding may be held to be a negligent act by a jury. Ligon v. International Rwy. Co., 269 App. Div. 809, 55 N.Y.S. 2d 444.

That, there was a legal duty on the part of the defendant who issued a ticket to plaintiff with a confirmed reservation to honor such confirmed reservation is unquestionable. The breach of such a duty is negligence. Levine v. City of New York, 309 N.Y. 88, 92-93, resettled 1. A.D. 2d 661, 147 N.Y.S. 2d 684, reversed on other grounds 2 N.Y. 2d 246, 159 N.Y.S. 2d 193.

That, there was a legal duty on the part of the defendant, who issued a specific seat assignment receipt to honor such specific seat assignment is unquestionable. The breach of such duty is negligence.

That, there was a legal duty on the part of defendant, who issued a specific seat assignment receipt to plaintiff, to investigate plaintiff's complaints with respect to said seat and to unseat, in favor of the plaintiff, a passenger wrongfully seated, therein. The breach of such a duty is negligence.

That, there was a legal duty on the part of the defendant, who issued a confirmed reservation and a specific seat assignment to plaintiff to transport plaintiff, accordingly, and not to cause plaintiff to be removed from said aircraft. The breach of such a duty is negligence.

The only relevant question to establish negligence is whether defendant breached a duty to plaintiff. (Jenks v. McGranahan, 30 N.Y. 2d 475, 334 N.Y.S. 2d 641) Levine v. City of New York, supra.

Whether the actions of the defendant common carrier, in all of these instances, were those of a reasonably prudent person, is a question of fact to be decided on trial.

Whether the actions of the defendant common carrier demonstrated reasonable care for the safety of its passengers, is a question of fact to be decided on trial.

Among the allegations of the first cause of action is that defendant's agents, servants and employees were improperly trained and acted in contradiction to the rules and regulations of the defendant which set a standard of care which was violated by the actions of defendant as alleged. Such conduct constitutes negligence and not a wilfull tort. Eifert v. Bush, 51 Misc. 2d 248, 272 N.Y.S. 2d 862.

Where, as here, appellee, National, assumed to act as it did in issuing a numbered seat receipt, it became subject to the duty of acting carefully, and where said airline had failed to exercise reasonable care, a duty to the appellant, Alice Meyers, has been violated and for this act of negligence, National Airlines may be held liable. (Ritter v. State, 122 N.Y.S. 2d 334.)

A complaint which does not allege "intent" in connection with a tortious act, states a cause of action in negligence and not for wilfull tort. Shea v. Esmay, 48 Misc. 2d 45, 264 N.Y.S. 2d 181, 50 Misc. 2d 509, 270 N.Y.S. 2d 768.

The attention of this Court is respectfully directed to the case of McCrink v. City of New York, 296 N.Y. 99, 71 N.E. 2d 419, in which case the Court of Appeals held that an action for negligence will lie against an employer for an assault committed by an employee. This

case makes the position of the plaintiff, herein, even stronger, for plaintiff does not allege an intentional assault but among other acts of negligence, a negligent forcible expulsion from an aircraft owned, operated and controlled by defendant.

> "Freedom from mental disturbance is a recognized and protected interest in negligence cases where there has been impact, Ferrara v. Galluchio, 5 N.Y. 2d 16, 21, 176 N.Y.S. 2d 996, 152 N.E. 2d 249; where there has been no impact, Battalla v. State, 10 N.Y. 2d 237, 219 N.Y.S. 2d 34, 176 N.E. 2d 729, and where there has been a trespass or an assault, Preiser v. Wielandt, 48 App. Div. 569, 62 N.Y.S. 890; Adams v. Rivers, 11 Barb 390. The reckless infliction of mental suffering is actionable. Halio v. Lurie, 15 A.D. 2d 62, 222 N.Y.S. 2d 759; Long v. Beneficial Finance Co., 39 A.D. 2d 11, 330 N.Y.S. 2d 664; Beck v. Libraro, 220 App. Div. 547, 221 N.Y.S. 737, Prosser, Torts (3rd ed.) 47, § 11; 1 Harper and James, The Law of Torts 665, § 9.1 and 9.2. Where there is the relationship of innkeeper and guest, grossly insulting and abusive conduct is similarly actionable, DeWolf v. Ford, 193 N.Y. 397, 86 N.E. 527."

Lopez v. City of New York, 357 N.Y.S. 2d 659.

> "As was stated in Canterbury v. Spence, 150 App. D.C. 263, 464 F. 2d 772 [1972], certiorari denied 409 U.S. 1064, 93 S.Ct. 560, 34 L. Ed. 2d 518, with reference to a case arising in the District of Columbia, the plaintiff's 'interest in bodily integrity commanded protection, not only against an intentional invasion by an unauthorized operation but also against a negligent invasion by his physicians' dereliction of duty to adequately disclose.' The Federal court concluded that the malpractice limitation should be applied."

Bruse v. Brickner, 359 N.Y.S. 2d 207, 209.

Where, as here, even though there are elements of wilfull tort involved, where plaintiffs do not rely on assault but allege negligence, the cause of action for negligence will lie. (Terry v. Albany Medical Center, 359 N.Y.S. 2d 235)

POINT III

THE GRAVAMEN OF THE SECOND CAUSE OF ACTION IS GROSS NEGLIGENCE.

Plaintiff's second cause of action is for punitive damages based upon the allegation that the negligence of the defendant as set forth in the first cause of action were such as to constitute gross negligence.

Punitive damages may be allowed upon proof of gross negligence. "Exemplary damages may be awarded in actions for personal injuries where the negligence is gross and culpable as to evince utter recklessness". Soucy v. Greyhound Corporation, 27 A.D. 2d 112, 276 N.Y.S. 2d 173.

Allegations of gross and wanton negligence will not be stricken from a complaint. "Punitive damages will lie because of defendant's gross and wanton negligence." Knibbs v. Wagner, 14 A.D. 2d 987, 222 N.Y.S. 2d 469, Soucy v. Greyhound Corporation, supra.; Hafner v. Guerlain, Inc., 34 A.D. 2d 162, 310 N.Y.S. 2d 141, 14 N.Y. Jur., Damages, Sec. 161.

A cause of action for gross negligence is governed by the three year Statute of Limitations. (See Sheppard v. Cooper, 181 N.Y.S. 2d 709, 14 Misc. 2d 180)

POINT IV

THE GRAVAMEN OF THE THIRD AND FOURTH CAUSES OF ACTION IS BREACH OF THE IMPLIED WARRANTY OF SAFE PASSAGE AND IS CONTROLLED BY THE THREE YEAR STATUTE OF LIMITATIONS.

That, the defendant, herein, is a common carrier is admitted in the pleadings.

As a common carrier the law implies a contract and a warranty that the carrier will provide safe and courteous passage for passenger. Brown v. Fifth Avenue Coach Lines, Inc., 185 N.Y.S. 2d 925.

This warranty was breached by the acts of the defendant as alleged in the third cause of action, including her expulsion from the aircraft.

The Court, below, held this is an intentional tort, and that it is subject to dismissal.

The law, however, does not support this position and has implied a warranty of safe passage by the imposition upon carriers of a duty to protect passengers arising out of the contract of passage.

The Court in Gulf, C. & S.G. Ry. Co., v. Conder, 58 S.W. 58, (Texas, Court of Appeals) states:

> It has been steadily held to be the duty of carriers of passengers to protect them, in so far as this can be done by the exercise of a high degree of care, from the violence and insults of the carrier's own servants; and inquiry whether this duty arises from contract or the nature of the employment becomes unimportant, except that the duty goes with the carrier's contract, however made; whereby the relation of carrier and passenger

> is established" The arrest of the appellee and his expulsion from the train were caused by the wrongful acts of the conductor and violative of a duty imposed upon the defendant by the contract of carriage it had entered into, which duty the defendant had delegated the conductor to perform. We therefore hold that the defendant is liable for the injury to appellee that proximately resulted from the wrongful act. Railway Co. v. Donahoe, 56 Tex. 162; Railway Co. v. Kinnebrew (Tex Civ. App.) 27 S.W. 631; Railway Co. v. Warner (Tex Civ. App.) 49 S.W. 254; Gillingham v. Railway Co. (W. Va.) 14 S.E. 243, 14 L.R.A. 798; Duggan v. Railway Co. (Pa.) 28 Atl. 182."

The Court then went on to state:

> "The conductor was the representative of the defendant employed to discharge the duty imposed upon it by virtue of its contract and the defendant must be held liable for the wrongful acts of the conductor which resulted in injury to the appellee. It is immaterial what instructions had been given the conductor by his superiors, for the defendant had intrusted him with the performance of the duty imposed upon it, and it cannot avoid liability by showing that the conductor acted wilfully and maliciously. Dillingham v. Russell, 73 Tex. 47, 11 S.W. 139, 3 L.R.A. 634."

A New York case arising from a similar fact pattern was Barad v. N.Y. Rapid Transit Corp., 162 Misc. 458, 295 N.Y.S. 901, in which plaintiff was assaulted by an employee of defendant. The jurisdiction of the Court in which the case was heard included actions to recover damages "for a personal injury . . . except actions to recover damages for assault". That Court held on the authority of Busch v. Interborough Rapid Transit Co., 187 N.Y. 388, 80 N.E. 197 and many other cases that the action sounded not in assault but for breach of a contract of safe passage and recovery was granted, ex contractu. The Court went on to state:

> "To visualize its theory we must again look to the doctrine of the implied contract of safe carriage, and the weight of authority upon this subject is so overwhelming that it would be fruitless for the Court to inquire into the rule as an original proposition. The extent of the liability of a carrier under the circumstances of this kind is sui generis because of the contract of safe carriage, which, as a public utility, a common carrier must be deemed to assume."
>
> "That no matter how malicious or wilfull the act upon the part of the servant, if it was not caused directly by the passenger's fault, it constituted a breach of the contract of safe passage."

To permit a passenger to purchase and board a train with a ticket for a station at which the train will not stop and to require passenger to debark at another station similarly breaches the implied warranty of safe passage. Louisville Nashville R.R. v. Thomas, 183 S.W. 2d 19.

The third and fourth causes of action are based upon breach of implied warranty of safe passage. The case of Loehr v. East Side, 259 App. Div. 200, 18 N.Y.S. 2d 529 (26a - 28a) holds that such an action is founded in tort and the three year Statute of Limitations is applicable. The defendant herein concedes that this action was commenced within the applicable three year period.

> "If the gravamen of the cause of action is predicated on a tort, the three year negligence statute controls (Atlas Assurance Company Ltd. v. Barry, 3 A.D. 2d 787, 160 N.Y.S. 2d 547, Federal Insurance Co. v. United Port Service Co., 23 Misc. 2d 142, 199 N.Y.S. 2d 552, affirmed 12 A.D. 2d 905, 114 N.Y.S. 2d 638)"

Teschler v. Sicolo, 64 Misc. 2d 825, 210 N.Y.S. 2d 453.

A cause of action lies when plaintiff has been wrongfully deprived of his seat on an aircraft. It is a breach of the duty implied from the contract of passage. Delta v. Porter, 27 S.E. 2d 758 (Ga.)

A cause of action for both tort and breach of contract may arise out of the same set of facts. Albemarle Theatre, Inc. v. Bayberry Realty Corp., 27 A.D. 2d 172, 277 N.Y.S. 2d 505.

The fourth cause of action is for punitive damages arising out of the wanton and reckless breach of implied warranty of safe passage.

Punitive damages lie, herein, and are supported by the following cases:

Safeway Trails, Inc. v. Schmidt, 225 A. 2d 317, (Ct. of Appeals, D.C.);

Archibald v. Pan American World Airways, 460 F. 2d 14 (Ct. of Appeals, 9th Cir.)

Nader v. Alleghany Airlines, Inc., 365 Fed. Supp. 128;

Mortimer v. Delta, 302 Fed. Supp. 276 (No. Dist. Ill.)

Delta v. Porter, 27 S.E. 2d 758 (Ga.)

POINT V

PLEADINGS ARE TO BE LIBERALLY CONSTRUED IN FAVOR OF THE PLEADING.

On motion to dismiss complaint, the pleading is required to be liberally construed. Napolitano v. Town of Chili, 74 Misc. 2d 920, 263 N.Y.S. 2d 367, affirmed 29 A.D. 2d 845, 288 N.Y.S. 2d 868, Mann v. Mann, 255 N.Y.S. 2d 686, C.P.L.R. Section 3026.

> "The Court must determine whether or not a cause of action has been stated by viewing the complaint in the aspect most favorable to the pleader. Gaynor v. Rockefeller, 21 A.D. 2d 92, 248 N.Y.S. 2d 792, Foley v. D'Agostino, 21 A.D. 2d 60, 248 N.Y.S. 2d 121.

Infusino v. Pelnik, 45 Misc. 2d 333, 256 N.Y.S. 2d 815.

The Court must adopt the theory of the complaint most favorable to the pleader. Sheehan v. Amity Estates, Inc., 27 A.D. 2d 594, 275 N.Y.S. 2d 644, Barrick v. Barrick, 24 A.D. 2d 895, 264 N.Y.S. 2d 888.

POINT VI

THE DEFENDANT HAS FAILED TO SUSTAIN ITS BURDEN ON THIS MOTION.

The burden of showing that this amended complaint does not state a cause of action for negligence is upon the movant herein, and, as such, if the cause may lie equally in negligence or wilfull tort, the movant has failed to sustain its burden. Foley v. D'Agostino, 21 A.D. 2d 60, 248 N.Y.S. 2d 121.

POINT VII

PLAINTIFF SHOULD BE GRANTED THE RIGHT TO REPLEAD HER CAUSES OF ACTION.

Where a complaint is dismissed for failure to state a cause of action, as is apparently what this Court has done, the Court, in exercise of its discretion, should allow plaintiff the opportunity to cure any defect which the Court found in her pleadings by repleading her causes of action, in the interests of justice (Kinner v. Board of Education, 6 A.D. 2d 204, 175 N.Y.S. 2d 707, affirmed 216 N.Y.S. 2d 92).

CONCLUSION

It is respectfully submitted that where, as here, appellant may be able to prove a cause of action in negligence, she should not be deprived of doing so by any alleged defect in the pleadings. As the cases herein cited have shown, where any negligent act will support the complaint, the complaint should not be dismissed.

Similarly, under our liberalized rules of pleading, the law implies certain warranties. A breach of warranty of safe passage may rely upon the same set of facts as has herein been pleaded and appellant, in the interests of justice, should not be deprived of her right to plead and prove this cause of action.

Wherefore, appellant respectfully requests that the order of the Court, below, be reversed and that appellant have such other and further relief as to this Court may seem just and proper.

Respectfully submitted,

LAWRENCE WALDMAN
Attorney for Plaintiff-Appellant

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Index No.

ALICE MEYERS, et al.,

Plaintiffs-Appellants.

- against -

NATIONAL AIRLINES, INC.,

Defendant-Appellee.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF **New York** *ss.:*

I, James Steele, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 250 West 146th, Street, New York, New York
That on the 11th *day of* April *1975 at* **One State Street Plaza, N.Y. N.Y.**

deponent served the annexed Brief (2) *upon*

Haight Gardner Poor & Havens

the **Attorneys** *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein.*

Sworn to before me, this 11th
day of April *1975*

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0413950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, ~~1975~~ 1977

James Steele

JAMES STEELE